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Robert D. Crutchfield

University of Washington, crutch@uw.edu

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Current Criminal Justice System Policy Reform Movements: The Problem of Unintended Consequences

Robert D. Crutchfield*

ABSTRACT

The history of criminal justice reform in the United States has numerous examples of both good and negative consequences. Frequently the latter have been unintended and unexpected. In this article, I point to several potential unintended consequences of the current, bipartisan push for criminal justice reform and how they may be exacerbated by the failure of policy makers to heed the knowledge of both academic criminologists and criminal justice system practitioners. Criminal justice reform can minimize the possibility of unintended negative consequences by using this knowledge and by following time honored principles of justice.

INTRODUCTION

Pundits, political observers, activists, and researchers have taken note that one of the few topics on which Republicans and Democrats have found common ground is the need for criminal justice system reform. At both the federal and state levels, efforts are underway to seriously consider means of reducing the number of people held in American prisons.¹ There are a variety of motivations for these reform efforts. For some it is realization of the costs to tax payers resulting from high rates of incarceration.² Others focus on justice, asking whether it is reasonable to hold such a large portion of US citizens and residents in secure facilities. Those concerned about justice also focus on the racial disproportionality of those locked up.³ Whatever the stated motivations of policymakers and politicians, the US debate about mass incarceration is, in this moment, largely a result of criminal justice reform social movements. Advocacy organizations as different as The Sentencing Project, the American Civil Liberties Union, New York University's Brennan Center, and The Right on Crime have found some common ground in their efforts to bring about criminal justice reform.

* Emeritus Professor of Sociology, Adjunct Professor of American Ethnic Studies, and Social Work at the University of Washington, and Honorary Professor of Social Sciences at the University of Queensland, Australia.

1 See Josh Siegel, *Bipartisan Group of Senators Set to Announce Deal to Reduce Prison Population*, DAILY SIGNAL (Aug. 31, 2015), <http://dailysignal.com/2015/08/31/bipartisan-group-of-senators-set-to-announce-deal-to-reduce-prison-population>.

2 *Id.*

3 *Id.*

If current bipartisan reform efforts are fruitful, they will join a long history of changes—resulting from social movement pressures—in how we handle individuals charged with violation of the law. If these efforts are successful, today’s movement efforts are likely to result in changes that are consistent with their intent, but there may be unintended consequences as well. This should not be a surprise. Prior reform movements have also had both intended and unintended consequences. The opportunity for unintended consequences, some of them very negative, likely increase when new laws and practices are largely driven by activists and politicians, rather than by criminal justice practitioners and scholars. Politicos and activists are frequently passionate and zealous about protecting the weak (for some activists, those are people who are locked up, but for others, the weak may be the victims of crime) or to be reelected. Practitioners are usually focused on getting the job done. Scholars pride themselves in coolly developing an understanding of how the actors in the justice system (both on the enforcement side and on the violations side) behave and how the system works. Policies and practices are likely to change the most when reformers and politicians bring their drive and passion for change to the forefront, and the best changes come when the knowledge of practitioners and scholars are central to the writing of laws and adapting policies. Without the latter, the chances of unintended, negative consequences increase.

I. EARLY CRIMINAL JUSTICE REFORM MOVEMENTS

Both the modern penal system and juvenile courts were the products of social movements. Indeed, in the case of both of these efforts, the charge was led by activists who felt that the United States could do better. The invention of penitentiaries was the result of reformers’ efforts to make the institutions that punished crime less arbitrary, cruel, and capricious.⁴ Prior to the movement that led to the creation of the first prisons designed to punish, lockups were used to hold the accused while they awaited trial or were awaiting their punishment—for felons, frequently corporal and cruel punishment, death, or both. After describing a particularly gruesome torture and execution in Eighteenth Century France, Foucault⁵ explains the shifting and reforming of punishment that subsequently took place in western societies:

Among so many changes, I shall consider one: the disappearance of torture as a public spectacle. Today we are rather inclined to ignore it; perhaps, in its time, it gave rise to too much inflated rhetoric; perhaps it has been attributed too readily and too emphatically to a process of ‘humanization’, thus dispensing with the need for further analysis And yet the fact remains that a few decades saw the disappearance of the tortured, dismembered, amputated body, symbolically branded

4 See CESAR BECCARIA, ON CRIMES AND PUNISHMENT (1986); MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (1979); MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750–1850 (1978); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (2000).

5 FOUCAULT, *supra* note 1.

on face or shoulder, exposed alive or dead to public view. The body as the major target of penal repression disappeared.⁶

An international movement changed this and the first penitentiaries were American creations, where doing time calibrated on the severity of the offense, could take the place of banishment, torture, maiming, and many executions. In many respects, these new institutions satisfied this intended goal. They were an improvement.

The same can be said of the invention of the juvenile court. The first court, another American innovation, was established in Cook County, Illinois, in 1899, largely through the efforts of social workers, notable among them was Jane Adams, who many credit with creating the social work profession.⁷ Early reformers felt that children were not as criminally culpable as adults, and while they were young, there was still opportunity for their reformation.⁸ Judge Benjamin Lindsey, who presided over the first Colorado Juvenile Court in Denver, became a bit of a zealot for the cause, campaigning throughout the United States and abroad for juvenile courts because of the good they would do for children and, as a consequence, for societies.⁹

Anthony Platt noted the well-intended motivations of these reformers.¹⁰ And it is hard not to recognize that children's law violations, handled in juvenile forums, had some very positive results. Platt noted that even early on the optimism of "the child savers" was tempered by the reality and negative, unintended consequences associated with this new form of court:

The passage of the Illinois juvenile court act in 1899 prompted a flood of optimistic rhetoric from child-saving organizations. Ephraim Banning, attending the National Conference of Charities and Correction in Cincinnati, described the act as "the chief even of the year." A delegate to a meeting of the States Attorneys' Association claimed that the juvenile court would "minimize crime by striking at its roots" and "prove the dawn of a new era in our criminal history" The act, however, did little to change the quality of institutional life for delinquents, though it facilitated the means by which juvenile offenders could be "reached" and committed. Contrary to a specific provision in the act, children continued to be imprisoned with adult criminals in country and city jails.¹¹

Looking back at the early history of the juvenile court and the movement that established it, Platt writes:

6 *Id.* at 7.

7 Ron Grossman, *Chicago Ushers in New Era in 1899 with Nation's First Juvenile Court*, CHICAGO TRIBUNE (June 8, 2014), http://articles.chicagotribune.com/2014-06-08/site/ct-juvenile-courts-flashback-0608-20140608_1_chicago-woman-young-offenders-new-era.

8 *Id.*

9 D'Ann Campbell, *Judge Ben Lindsey and the Juvenile Court Movement 1901-1904*, 18 ARIZ. W. 5 (1976).

10 ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* xiv-xviii (1969).

11 *Id.* at 145.

Criticism of the juvenile court system over the last fifty years has come from persons expressing two diametrically opposed ideological perspectives. To the “legal moralists,” the juvenile court is a politically ineffective and morally improper means of controlling juvenile crime. To the “constitutionalists,” the juvenile court is arbitrary, unconstitutional, and violates the principles of fair trial. The former view concerns the protection of society, the latter addresses the safe-guarding of individual rights.¹²

Decades later, in a series of decisions, the US Supreme Court affirmed that many fundamental citizens’ rights were incorrectly denied to juveniles in the courts’ quest to act in *parens patriae*, the critical philosophy underlying the courts existence that the state should act in place of parents in order to afford children the best care and outcomes.¹³ Subsequent court decisions have held that there are limits on the rights of those appearing before juvenile courts.¹⁴

The intended consequences of the movement to establish the juvenile court were laudable, and few or any would conclude that young people would have been better off subjected to the same treatment as adults in criminal justice systems in the western world. But as critics have noted, the unintended consequences, most notably the denial of basic civil rights protections, have at times left those who have stood before juvenile courts with harsh and unfair treatment.¹⁵

Similarly, it is hard to deny that the social movement that began the creation of the modern penitentiary allowed for many states to outlaw torture of the convicted, reduce the use of capital punishment, and open the door for more humane treatment of those convicted of felonies. But, America’s binge on imprisonment, mass incarceration, also was a result—a negative, unintended consequence of that early criminal justice system reform movement.¹⁶

A. Movement for Sentencing Reform

More recently, sentencing reforms began as a part of the political movement that was at the heart of the Republican Party’s “Southern strategy.”¹⁷ The get-tough-on-crime platform of Richard Nixon’s campaign and subsequent presidency was a politically charged reaction to urban crime, race riots, and changes in American society that frightened some (e.g., the civil rights movement itself was frightening to some), notably Southern and working class whites.¹⁸ Democratic Party politicians, not wanting to be defined as “soft on crime,” became complicit in

12 *Id.* at 152.

13 *See In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1965).

14 *See In re Winship*, 397 U.S. 358 (1970).

15 *See* PLATT, *supra* note 4, at 104; BARRY FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 165 (1999).

16 *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (Jeremy Travis & Bruce Western eds., 2014); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011).

17 TONRY, *supra* note 16, at 2.

18 NAT’L RESEARCH COUNCIL, *supra* note 16, at 116; TONRY, *supra* note 16, at 83.

the early 1970s, joining the bipartisan movement that pushed for changes in sentencing laws (e.g., truth in sentencing, restricting and in many states ending parole, and longer sentences). This push for tougher sentences was for many types of crimes, but it was especially aimed at those convicted of violent offenses.

As seems to happen repeatedly with movements to bring about reform in the criminal justice system, those conservative efforts moved forward with strange, liberal bedfellows. Criminal justice reform activists, intending to rid the system of arbitrary and subjective decision making, which was thought to produce unwarranted racial and social class disparity in jails and prisons, joined with get-tough-on-crime advocates to change practices.¹⁹ Notable among those reforms were moves toward determinate sentencing, elimination of parole, truth in sentencing laws, and narrow sentencing guidelines. Conservatives intended that these changes would make sure that those convicted would do the amount of time mandated by legislatures. Liberals intended that they would eliminate racial and class differences in imprisonment that were not linked to offense differences.²⁰

Certainly sentences became longer, fewer inmates were released early as a result of here-to-fore longstanding criminal justice practices such as “good time,” and judges had less discretion. Unfortunately, unintended consequences that resulted from those reforms are partially responsible for where we are today, with mass incarceration and more, rather than less, racial disparity in imprisonment.²¹

B. The War on Drugs

It is hard to call the “War on Drugs” a social movement, but it did result from a widespread moral panic that produced anti-drugs moral entrepreneurs²² and politicians of both major American parties were eager to sign-on to getting tough on those who sold and used drugs.²³ With estimates suggesting that drug use has not been appreciably affected by the criminal justice system’s war and both federal and state prisons now teaming with drug offenders²⁴, it is hard to identify positive consequences, either intended or unintended, resulting from these policies.

It is much easier to note the negative unintended consequences of the US’s War on Drugs. Increased law enforcement of drug laws, longer sentences, higher mandatory minimum sentences, the crack cocaine sentencing enhancement, other drug violation enhancements (e.g., selling within prohibited distances from schools,

19 NAT’L RESEARCH COUNCIL, *supra* note 16, at 117;

20 *Id.* at 72.

21 See ALEXANDER, *supra* note 16; NAT’L RESEARCH COUNCIL, *supra* note 16; TONRY, *supra* note 16; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 30–32 (2006).

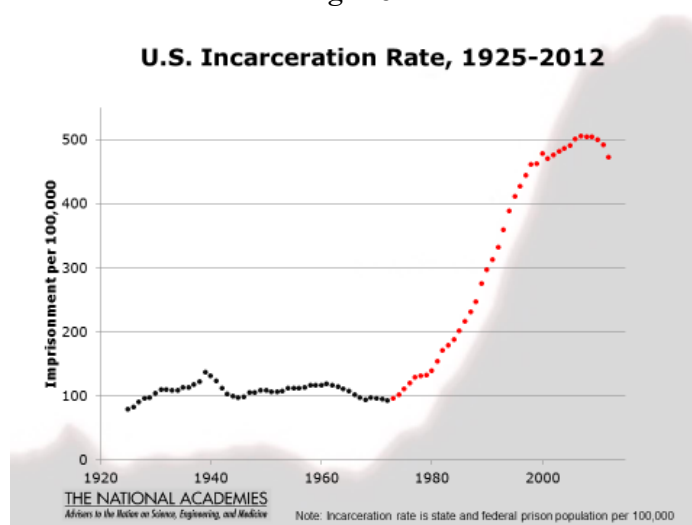
22 Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 558 (1989).

23 Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 2–3 (2008).

24 *Id.*

firearm possession while in possession of illegal drugs), have contributed, along with tougher sentences for other crimes, to mass incarceration. These two sets of policies, longer sentences and increased punishment for drug violations, are responsible for quintupling the number of people locked in American state and federal prisons.²⁵ As critics of these policies are fond of pointing out, the United States now has one fifth of the world's population but twenty-five percent of the prisoners.²⁶

Figure 1



Changes to sentencing policies beginning in the 1970s and continuing into the 1980s as well as policy and practice changes of the War on Drugs has led to increased racial disparity in imprisonment. Early studies found substantial black/white difference in incarceration.²⁷ These differences were observed at the federal level and for all fifty states.²⁸ These studies did not investigate possible disproportionality between Latinos, whites, and blacks, but recent studies have.²⁹

25 TONRY, *supra* note 16, at 5, 56.

26 NAT'L RESEARCH COUNCIL, *supra* note 16, at 2.

27 See Alfred Blumstein, *On the Racial Disproportionality of the United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1260 (1982); Scott Christianson, *Legal Implications of Racially Disproportionate Incarceration Rates*, 16 CRIM. L. BULL. 59, 59-63 (1980); Patrick Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 667 (1985).

28 See George S. Bridges & Robert D. Crutchfield, *Law, Social Standing and Racial Disparities in Imprisonment*, 66 SOC. FORCES 699, 710 (1988); Robert D. Crutchfield et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166, 175 (1994).

29 Cassia Spohn & David Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 281, 287 (2000); Jeffery Ulmer et al., *Disproportional Imprisonment of Black and Hispanic Males: Sentencing Discretion, Processing Outcomes, and Policy Structures*, 33 JUST. Q. 642, 653-657 (2016); Patricia Warren et al., *The Imprisonment Penalty for Young Black and Hispanic Males: A Crime-Specific Analysis*, 49 J. RES. CRIME & DELINQ. 56, 67 (2012).

These recent studies have concluded that Hispanics are also disproportionately confined in US prisons as well. There has been a robust debate among criminologists about which portion of racial and ethnic differences in imprisonment are warranted—a result of higher rates of criminal involvement among minorities—and which portion is unwarranted—a product of bias in the criminal justice system.³⁰ This debate is unsettled, but it is safe to say that nearly all contemporary criminologists think that some portion of racial and ethnic differences in incarceration are unwarranted; what remains is disagreement of how much. For our purpose here, that debate is only partially relevant. What is more centrally relevant is that these criminologists, as well as others, agree that there are not only important racial and ethnic differences in incarceration, but there are also significant and important racial and ethnic differences in criminal involvement. These differences are relevant for this discussion.

II. THE CURRENT BIPARTISAN MOVEMENT FOR CRIMINAL JUSTICE REFORM

In March 2016, former Deputy Attorney General Sally Q. Yates was quoted in the *Dallas News*, “Through cooperative bipartisan efforts with Congress, the U.S. Sentencing Commission and reform advocacy groups, we hope to soon realize systemic change in the length of prison sentences for these low-level drug offenders and to provide better tools for a safe and successful re-entry into the community.”³¹ A July 2015 article in *Time Magazine* described President Obama’s speech to the NAACP stating,

Obama noted the “strange bedfellows” that efforts to reform the criminal justice system have created, among them the Koch brothers and the NAACP. At one point, he even quoted Republican Senator Rand Paul of Kentucky, who is running for the 2016 Republican presidential nomination, drawing a mixed response from the crowd.³²

Rarely has there been even a semblance of bipartisan support on an issue in the political climate of the early decades of the twenty-first century, particularly on a historically hot button topic such as criminal justice reform. But many Democrats and Republicans have joined in the common effort to reduce the number of people held in US prisons. Early this year a piece titled “Conservatives Make Their Case

30 See generally R. Richard Banks, et. al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. LAW REV. 1169, 1169–90 (discussing one of the many arguments surrounding racial differences in imprisonment).

31 Elizabeth Koh, *President Commutes Prison Time for Fort Worth Drug Offender and 60 Others*, DALLAS NEWS (Mar. 30, 2016), <http://trailblazersblog.dallasnews.com/2016/03/president-obama-commutes-prison-time-for-61-drug-offenders-including-fort-worth-man.html>.

32 Maya Rhodan, *Obama Calls for Sweeping Criminal Justice Reforms in NAACP Speech*, TIME (July 14, 2015), <http://time.com/3958093/barack-obama-criminal-justice-reforms-naacp>.

for Criminal Justice Reform” (at the Conservative Political Action Conference) on the website of organization The Right On Crime:

[Tennessee] panel recommends³³ instituting longer prison sentences for serious violent crimes and promoting alternatives to incarceration for low-level drug offenders ‘We have decided we’ve got to do a better job on focusing our limited resources on the most violent offenders,’ said Kelsey, who added that 40 percent of Tennessee’s prison population is made up of those committing technical violations of probation and parole.³⁴

The Right on Crime is a group of self-avowed conservatives campaigning for criminal justice reform. One of its founders, Grover Norquist, spoke at the twenty-fifth anniversary of The Sentencing Project, a prominent, progressive criminal justice research and reform non-profit. Norquist argued, along with others on the panel, that there was a real need for the right and the left to come together to address mass incarceration.

Of course there are others, both among politicians and in the general public, who do not agree with the bipartisan effort, movement, to bring about reforms that would reduce imprisonment. This is important because statements, pending legal actions, and the few policy efforts that have happened, have taken these dissenters into account, not wanting to generate substantial political opposition and trying to avoid an embarrassing Willie Horton like moment.³⁵

In the effort to keep these reform efforts on track—to maintain the bipartisan character of these efforts and to keep the public from pushing back—some commitments, spoken but sometimes unspoken, have seemingly been made. It does not matter much if these commitments have been formally made or if they are “understood” widely. As a result, the effort to reduce the number of people incarcerated in American prisons has focused first on reducing the sentences of some people who are first time offenders, low-level drug offenders, and those convicted for non-violent offenses. Second, there has been a focus on undoing some of the excesses of the War on Drugs (e.g., rolling back some long sentences, removing or lowering some mandatory minimum sentences, the recent reduction in the crack/powder cocaine differential sentences at the federal level). There appears to be little or no discussion at high levels of politics or in the public media of a broader sentencing reform effort.

33 TENN. STATE GOV’T, FINAL REPORT OF THE GOVERNOR’S TASK FORCE ON SENTENCING AND RECIDIVISM (2015).

34 Josh Siegel, *Conservatives Make Their Case for Criminal Justice Reform*, DAILY SIGNAL (Mar. 7, 2016), <http://dailysignal.com/2016/03/07/the-conservative-case-for-criminal-justice-reform>.

35 Willie Horton was a Massachusetts inmate out on furlough from prison during the administration of Governor Michael Dukakis, who while on furlough committed new violent crimes. Vice President George H.W. Bush, in his successful run for President, used Willie Horton effectively to discredit Dukakis’s time as Governor, who was running against him as the Democratic nominee.

Given the political history of the United States from the late 1960s, when Richard Nixon made a pillar of his first successful run for the White House using the “law and order” slogan, there is little wonder that even the most ardent political supporters of criminal justice reform would be cautious about who benefits from pardons, commutations, sentencing reductions, or changes in sentencing policy. Former US Attorney General Eric Holder acted boldly early in this effort, but his focus was on offenders with limited criminal histories and low-level drug offenders.³⁶ President Barack Obama, at the conclusion of his term, commuted the sentences of a relatively large number of federal prisoners.³⁷ Yet those receiving commutations have followed the same pattern as those focused on by Holder. While this caution may be understandable given the political realities, focusing on this group to reduce mass incarceration does not comport with well-known criminological facts. This is especially so if one of the stated objectives is to reduce racial disparities that have grown worse with the substantial increase in the numbers of people imprisoned since 1980. Testifying before Congress, Marc Mauer, the Executive Director of the Sentencing Project, stated:

There are many indicators of the profound impact of disproportionate rates of incarceration in communities of color. Perhaps the most stark among these are the data generated by the Department of Justice that project that if current trends continue, one of every three black males born today will go to prison in his lifetime, as will one of every six Latino males (rates of incarceration for women overall are lower than for men, but similar racial/ethnic disparities pertain). Regardless of what one views as the causes of this situation, it should be deeply disturbing to all Americans that these figures represent the future for a generation of children growing up today.³⁸

III. CRIMINOLOGICAL “FACTS” AND THE CURRENT SOCIAL MOVEMENT FOR CRIMINAL JUSTICE REFORM

Before beginning this section, let me take note that many criminologists, like most contemporary social scientists, are likely to blanch at using the term “facts.” However one chooses to refer to the summaries of criminological knowledge that I will use here, there is widespread agreement among scholars who study crime, criminals, and criminal justice that for the most part what I am here calling “facts,” are settled knowledge.

36 See Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 825 (2017).

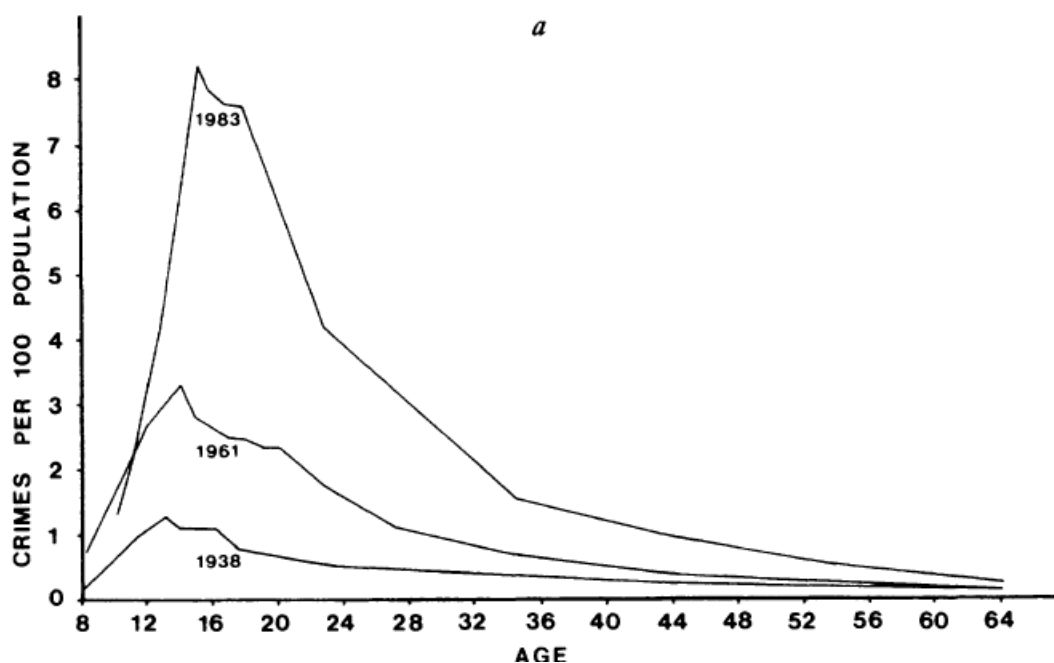
37 Alan Pyke, *Obama Commutes 330 Sentences in a Bittersweet Advance for Clemency*, THINKPROGRESS (Jan. 19, 2016), <https://thinkprogress.org/obama-commutes-330-sentence-in-a-bittersweet-advance-for-clemency-ce135295e6f0#.1nzrcsv05>.

38 Marc Mauer, *Racial Disparities in the Criminal Justice System*, SENTENCING PROJECT (Oct. 29, 2009), <https://judiciary.house.gov/wp-content/uploads/2009/10/Mauer091029.pdf>.

A. The Age Crime Curve

There are few criminological “facts” that can rival the age-crime pattern that has been observed in every society where crime has been studied and during every period in which we have data. Criminal involvement is a younger person’s activity. Criminologists refer to the oft-observed pattern as the “age-crime curve.”³⁹ Over the life course, criminal behavior escalates in the teen years and then begins to tail off as people move into their twenties. Figure 2 is a classic illustration of this pattern, published by David Farrington in a review of literature about the correlation between the age of offenders and crime.⁴⁰ This pattern can be observed for a wide array of crimes. Generally, the onset of violent behavior begins just a little later and does not wind down quite as early as crime generally.⁴¹

FIGURE 2: A Classic Age Crime Curve⁴²



While this pattern has been observed widely and applies to nearly all people who engage in criminal action, there are individuals who deviate from the observed age-crime pattern. Moffitt and her colleagues have distinguished two general types

39 Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 556 (1989).

40 David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189, 192 (1986).

41 Compare Figure 2, *infra* note 42 with Figure 3, *infra* p. 325.

42 The relation between age and crime for English males. For the years 1983, 1961, and 1983. Source: Home Office (1940, 1962, 1984). This figure is taken from David P. Farrington, *Age and Crime*, 7 CRIME & JUST. 189–250 (1986).

of juvenile offenders and the distinction she makes has implications for criminal justice practice.⁴³ “Adolescence limited” offenders constitute the vast majority of law violators. Adolescent-limited offenders generally conform to the age crime curve as it is illustrated in Figure 2. Moffitt and her colleagues characterize delinquent behavior that occurs during adolescence and, for some, into young adulthood as transitory; and for this group, criminal involvement generally ends with or without intervention from either the juvenile or criminal justice systems.

“[A]dolescence-limited” [AL] antisocial behavior emerges alongside puberty, when otherwise healthy youngsters experience dysphoria during the relatively role-less years between their biological maturation and their access to mature privileges and responsibilities, a period we called the maturity gap. . . . However, because their predelinquent development was normal and healthy, most young people who become AL delinquents are able to desist from crime when they age into real adult roles, turning gradually to a more conventional lifestyle.⁴⁴

Moffitt and her colleagues describe the other category of offenders as “life-course persistent.” Fortunately, they are a very small portion of offenders. They do not conform to the decline pattern that has been observed for most offenders. This small group of offenders continues to be involved in crime and other forms of deviant behavior and are responsible for a disproportionate share of offenses.

[L]ife-course-persistent” antisocial behavior originates early in life, when the difficult behavior of a high-risk young child is exacerbated by a high-risk social environment. . . . Over the first 2 decades of development, transactions between individual and environment gradually construct a disordered personality with hallmark features of physical aggression and antisocial behavior persisting to midlife.⁴⁵

Criminal justice policies have historically tried to react to and deter adolescent limited offenders, helping them to accelerate their departure from criminal involvement either through sanctioning or rehabilitation. At the same time, the institutions of the justice system attempt to give increasingly longer sentences to those who continue to offend. Unfortunately, it is difficult, many would say impossible, to *a priori* identify life course persistent offenders, so many who are actually adolescent-limited become caught up in the system. The logic of three strike laws was sold to the public on the belief that they would punish life course persistent offenders, albeit without the criminological jargon, but few scholars

43 Terrie E. Moffitt et al., *Males on the Life-Course Persistent and Adolescence-Limited Antisocial Pathways: Follow-up at Age 26 Years*, 14 DEV. & PSYCHOPATHOLOGY 179, 179 (2002).

44 *Id.* at 180.

45 *Id.*

believe that it is knowable that a third strike by the mid-twenties is indicative that the person is a life-course-persistent offender.⁴⁶

A problem with three strikes laws is that it is virtually impossible to practically identify and separate out life-course-persistent offenders from adolescent-limited offenders, except by following their actual criminal behavior. When we see someone continuing their criminal conduct into their late twenties on into their thirties and forties, and perhaps even beyond, we can make a pretty good guess that they fit with the concept of life-course-persistent offenders. When a person is sentenced to their third strike in their twenties, whether behavior fits with the adolescent-limited or the life-course-persistent patterns of offending is virtually impossible to say. If their pattern follows the latter pattern, then perhaps sentencing them to a life term for their third strike may make crime prevention sense. If on the other hand their pattern fits the former, the adolescent-limited, as most offenders do, then the sentencing authority has very likely wasted citizens' money by locking up someone for many, many years who was probably at or approaching the end of their years of criminal involvement.

To be clear, the age crime curve pattern and the normal aging out of crime do not hold true for those classes of criminal actions that young people do not have the opportunity to commit. The easy example is white collar crime. One has to have had the opportunity to be in professional positions to be able to violate laws such as embezzlement and security fraud. Also, we know that violence, while it follows a similar pattern, has an onset that is slightly later and may not diminish as rapidly as age progresses, as crime generally.⁴⁷ Yet it is safe to say, that even for violent criminal behavior, the patterns of the age crime curve can be observed (see Figure 3). The onset of violent behavior occurs and continues a bit later into the life cycle, but the pattern of desistance with age occurs for these crimes too—frequently even without justice system intervention.⁴⁸

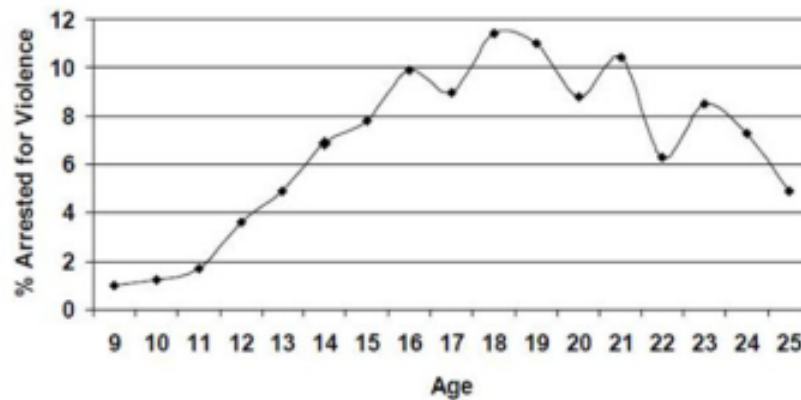
46 *Id.*

47 Compare Rolf Loeber & Rebecca Stallings, *Modeling the Impact of Interventions on Local Indicators of Offending, Victimization, and Incarceration*, in YOUNG HOMICIDE OFFENDERS AND VICTIMS: RISK FACTORS, PREDICTION, AND PREVENTION FROM CHILDHOOD (Rolf Loeber & David P. Farrington eds. 2011) (Figure 3) with Figure 2, *supra* note 42.

48 See generally U.S. DEP'T OF JUST., NCJ-162031, AGE PATTERNS OF VICTIMS OF SERIOUS VIOLENT CRIME (1997).

Figure 3

Age & Violent Crime Curve



Source: Loeber, Rolf, and Rebecca Stallings, "Modeling the Impact of Interventions on Local Indicators of Offending, Victimization, and Incarceration," in *Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood*, eds. Rolf Loeber and David P. Farrington, New York: Springer, 2011: 137-152.

<http://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx#age>

This pattern has implications for a number of criminal justice policies. For our purposes here, the focus is on the implications of the age-crime curve for how current efforts to reform the criminal justice system to reduce mass incarceration, are implemented. For example, if the emphasis is on pardoning first time offenders, we may actually release inmates most likely to recidivate if they are still in the "crime prone years," between the ages of eighteen and the mid-twenties.

B. Criminals Do Not Specialize

Few criminological "facts" have the power to generate arguments and pushback from members of the public as the statement, "Most criminals do not generally specialize." Instead, offending tends to be versatile. Typically, the response is something to the effect of "Oh yeah? What about sex offenders?" But, criminologists have shown that *most* people who violate criminal laws are not specialists, they are opportunists.⁴⁹ These opportunists include most sex

⁴⁹ See Glenn Deane et al., *An Examination of Offense Specialization Using Marginal Logit Models*, 43 CRIMINOLOGY 955 (2005); Charles E. Faupel, *Heroin Use, Street Crime, and the "Main Hustle": Implications for the Validity of Official Crime Data*, 7 DEVIAN'T BEHAV. 31 (1986).

offenders.⁵⁰ This is not to say that criminals never specialize, but rather, the vast majority—those that we should address our policies to deal with and react to—do not. Also, while it is safe to say that most criminologists hold that offenders do not specialize, this “fact” is not as broadly agreed upon as the relationship between age and criminal involvement.

C. Crimes of Opportunity

When criminologists refer to crimes of opportunity, we simply mean that those who, for whatever reason, are “motivated” to engage in crime may break the laws when presented with the chance or opportunity. So, the prototypical burglar is not a professional who is skilled at defeating alarm systems and targeting the jewelry and art of the wealthy. This imagery is a favorite of Hollywood, but it does not square with reality. The typical burglar is a teenaged boy who happens to find easy entry (i.e., open ground floor windows, sliding glass deck doors, or unlocked doors, or accessible tempting targets (i.e., easy to carry gadgets or other valuables just inside an easily breakable window. These “burglars” more often strike during the day when they should be in school or just after school dismissal, not at night when we are sound asleep in our beds. That same burglar may be guilty of drug possession if he and friends elect to get high before or after their caper (most juvenile delinquency happens in groups). And these burglars might be robbers or rapists or even murderers at some point if the pattern of their lifestyle causes them to be in particular circumstances.

We should take note that great debate continues among criminologists about why some people are “motivated” to commit crimes, while most are not. The theoretical debates and resulting empirical tests range from rational choice arguments—potential offenders weigh the costs and benefits of violating the law and choose their actions, to root causes that compel them to criminality.⁵¹ Between the extremes are criminological theoretical variants that stress how families, communities, poverty, inequality, and a host of other factors can influence either the choices that individuals make or determine the path towards crime that they live their lives on. Where a particular scholar is positioned in these debates will indicate their take on how the criminal and juvenile justice systems and the society more broadly might best attempt to curb crime. But, this is far, far, far from a settled debate. Here, I focus instead on “facts” that most criminologists agree on, and which we should consider the implication as we examine policies and practices to try to mitigate mass incarceration and its fallout.

50 Terance D. Miethe et al., *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, J. OF RES. IN CRIME AND DELINQ. 204 (2006).

51 See *supra* note 29 and accompanying text.

Not all of those who are motivated to violate the law are equally as likely to engage in every and all types of violations.⁵² Clearly there are people who will engage in violence and those who will not. There are those who will try heroin or cocaine, others who will never move beyond marijuana, and still others who will not. These patterns do not constitute their identity.

D. It Is Not What They Are, But What They Are Convicted Of

It makes perfectly good sense to sentence people to sanctions that their extant offense and criminal history justifies. If people are convicted of a drug offense their sentence should reflect that. If convicted for an act of violence, the idea is that they have done the crime so they should do the time. We should not, however, confuse what people are convicted and sentenced for with their identity. We should not reify their conviction offense in such a way that we expect it to define or predict their future behavior. Before people go to prison, they are criminal opportunists, when they come out, and in fact while they are locked up, they are likely to be criminal opportunists as well. That is, unless age, rehabilitation, or deterrence has interrupted their motivation to violate laws.

Our collective tendency to define people who are in prison by what they have been convicted of is to ignore a host of very important facts. Foremost among them is that since criminals do not specialize, we run the risk of thinking of people only in terms of a particular offense—as if that is all they have ever done and that is what they are likely to do in the future.⁵³ The reality is far more complicated than that. First, many offenders, by the time they are sentenced to a prison term in a federal or state penitentiary have engaged in other criminal behaviors.⁵⁴ Sometimes that history is reflected in offenders' official criminal history and can be taken into account by a judge, sentencing authority, or even a parole board when they are considered for release. Often it is not. Even if an individual is a “first offender”—that is, an individual formally facing the criminal justice system for the first time—the individual is very likely have engaged in law-violating behavior that is not a part of his official criminal history.

In many states, if individuals have appeared in juvenile court, those records are not a part of their adult criminal history unless they were charged in adult court. Even if this was not the case, we should collectively appreciate the reality that most offenders are never caught, arrested, prosecuted, or convicted for many

52 See generally MARSHALL B. CLINARD & RICHARD QUINNEY, *CRIMINAL BEHAVIOR SYSTEMS, A TYPOLOGY* (1967).

53 GLENN D. WALTERS, *THE CRIMINAL LIFESTYLE: PATTERNS OF SERIOUS CRIMINAL CONDUCT* (1990).

54 Bill Keller, *Seven Things to Know About Repeat Offenders*, Marshall Project (Mar. 9, 2016, 11:00 PM), <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders#.IV2hFF7VE>.

violations.⁵⁵ A person arrested at the age of nineteen for first time drug sales almost certainly has prior acts of drug possession, but also may have been involved in undetected violations of either property or violent offenses. So, to think of them as a first time drug offender, for some purposes may be fine, but if we are using that as the criteria to determine who is worthy of compassion or a reasonable bet for early release, we are deluding our collective selves.

Simply knowing what an individual is convicted of does not alone ordinarily provide substantial guidance in predicting who is likely to offend again. Practices in the criminal justice system at times may suggest something different. For instance, we know that long-time prisoners, “lifers” especially, provide stability among prison populations. These inmates, frequently sentenced for homicide or other violent crimes, are less likely to violate prison rules, and they ordinarily cause fewer behavior problems for corrections staff. Counselors and social services providers find similar patterns. Rookie parole officers are fortunate when they begin their caseload supervision with people who have been paroled from murder sentences.⁵⁶ It is not that offenders who have committed these most serious crimes are “better people” than other offenders, they are older. They usually have aged out of crime, thus they have fewer infractions late in their incarceration and are less likely to violate parole once they are released. If one were to look closely at these same offenders’ patterns of arrest and charges prior to their conviction for these serious offenses, one would see that offenders generally they have been involved in other nonspecialized law violations when they were young.

An unfortunate reality is that sentencing a person who is convicted for a serious violent crime for what is perceived by the public to be too short of a term of imprisonment or commuting or pardoning such a person, is potentially embarrassing to the government official who makes the decision. Any additional offense by someone like Willie Horton, who was furloughed from a Massachusetts penitentiary when Michal Dukakis was governor, is potentially very embarrassing. Horton did not return from his furlough and went on a crime spree that resulted in new convictions for rape and aggravated assault and two life sentences in Maryland. His story very likely contributed to Dukakis losing his presidential bid—so embarrassed was he by the political advertisements run by George H.W. Bush. Although the embarrassment is not likely to be as widely known for most officials or for agencies, the risk is a concern. The reality is that there is no reason to believe, based on the original offense for which Willie Horton or any other person is convicted, that his earlier conviction will make the potential risk more or less likely—because most criminals do not specialize.

55 *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system>.

56 The author was in fact given a caseload of all “murders” as he began as a new parole officer for the Pennsylvania Board of Probation and Parole in the early 1970s.

E. Racial Patterns in Offending

There are significant racial differences in the crimes for which people are sentenced to American prisons. In general, African Americans and Latinos are sentenced to terms of imprisonment more frequently than would be expected based on their distributions in the population. As mentioned above, a debate continues among criminologists about the proportion of these differences that can be explained by higher levels of criminal involvement by people in these ethnic categories. What is clear is that people of color, especially African American men, are more likely to have been convicted and sentenced for violent offenses.

TABLE 1⁵⁷

Estimated percent of sentenced prisoners under federal correctional authority, by most serious offense, sex, race, and Hispanic origin, September 30, 2014

Most serious offense	All inmates ^a	Male	Female	White ^b	Black ^b	Hispanic
Violent	7.3%	7.5%	4.4%	7.1%	9.9%	2.0%
Homicide ^c	1.5	1.5	1.3	0.7	2.4	0.3
Robbery	3.8	3.9	1.7	5.0	5.6	0.9
Other violent	2.1	2.2	1.4	1.5	2.0	0.8
Property	6.0%	5.2%	18.3%	10.0%	5.9%	2.7%
Burglary	0.2	0.2	0.2	0.2	0.4	0.0
Fraud	4.7	3.9	15.5	7.8	4.4	2.3
Other property	1.1	1.0	2.7	2.0	1.1	0.4
Drug^d	50.1%	49.5%	58.8%	40.3%	52.5%	56.9%
Public order	35.9%	37.1%	17.9%	41.2%	31.2%	38.0%
Immigration	8.9	9.3	3.7	1.2	0.4	25.5
Weapons	15.8	16.6	4.3	14.8	24.8	7.1
Other	11.1	11.2	9.8	25.3	6.1	5.4
Other/unspecified^e	0.7%	0.7%	0.6%	1.4%	0.5%	0.4%
Total number of sentenced inmates^f	192,663	180,140	12,523	51,600	71,300	63,700

Note: Counts are based on sentenced prisoners under federal jurisdiction, regardless of sentence length. Detail may not sum to total due to rounding and missing offense data. See *Methodology*.

^aIncludes American Indians and Alaska Natives; Asians, Native Hawaiians, and other Pacific Islanders; and persons of two or more races.

^bExcludes persons of Hispanic or Latino origin and persons of two or more races.

^cIncludes murder, negligent, and nonnegligent manslaughter.

^dIncludes trafficking, possession, and other drug offenses.

^eIncludes offenses not classified.

^fIncludes sentenced inmates under federal jurisdiction, regardless of sentence length.

Source: Bureau of Justice Statistics, Federal Justice Statistics Program, 2014.

Two important patterns should be noted in Table 1. First, African Americans are more likely to serve time for violent offenses. We must remember that this merely means that these offenders are presently serving time for a violent offense. Second, both African Americans and Latinos have been sentenced in greater numbers than are their distribution in the US population for drug offenses. What is very important about this second pattern is that there is no reason to believe that members of either of these ethnic groups are more likely to possess, use, or sell illegal drugs than are members of other racial/ethnic groups.⁵⁸ African Americans are roughly thirteen percent of the US population, and people of the nationality groups that constitute the Hispanic category were seventeen percent of the population in 2014 according to the US Bureau of the Census. Since African Americans and Latinos are no more likely to possess or sell drugs than other races/ethnic groups, the distribution of these groups in prison for drug offenses should reflect these same distributions. Criminologists believe that there are more people of color in federal and state prisons for drug offenses than we should expect because of enforcement patterns.⁵⁹ Police are more likely to surveil and make arrests in the places where minorities more frequently sell and use drugs than where whites engage in the same behaviors and in the same proportions.

It is a painful fact for some to accept, but it must be acknowledged that African Americans do currently engage in more violent crimes than do others in the population.⁶⁰ To be very clear, that statement focuses on *violent crimes*. The same cannot be said for either property or drug crimes. Many in the general citizenry, especially African Americans, do not accept this “fact.”⁶¹ It is fair to say, though, that among most research criminologists, it is accepted that in the United States, African Americans do have higher rates of involvement in violent criminal offenses. Recent research makes a very strong case that this pattern is a consequence of a large portion of the black population living in hyper-socially and economically disadvantaged places. Research also indicates that this pattern is also a

58 Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 31–32 (2008).

59 Katherine Beckett et al, *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBLEMS 419, 434–437 (2005).

60 See generally George Gao, *Chart of the Week: The Black-White Gap in Incarceration Rates*, PEW RESEARCH CENTER (July 18, 2014), <http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates/>.

61 See Charles Blow, *Crime, Bias and Statistics*, N.Y. TIMES (Sep. 7, 2014), <http://www.nytimes.com/2014/09/08/opinion/charles-blow-crime-bias-and-statistics.html>; Kevin Jackson, *Sharpton: Blacks Don't Commit Crimes*, THE BLACK SPHERE (Aug. 6, 2013), <http://theblacksphere.net/2013/08/sharpton-blacks-dont-commit-crime/> for discussion of this issue in popular media.

consequence of the continuing high levels of racial residential segregation in the United States.⁶²

The racial differences in violent crime involvement was observed in the 1970s before the large buildup that resulted in what we now call mass incarceration (based on arrest statistics).⁶³ Racial differences in violent offending has been observed using both victimization surveys and vital statistics.⁶⁴ It should also be noted that African Americans are more likely than other segments of the population to be the victims of criminal violence.⁶⁵

Of course the critical question for many criminologists is why these racial differences in offending exist. In addition to the very good work that points towards living in disadvantaged communities, there is also good research that has focused on the historical and ongoing oppression of African Americans in the United States as the source of criminal behavior.⁶⁶ There is emerging research that indicates that racially biased policing likely increases criminal behavior among young African Americans.⁶⁷ Still, others argue that African Americans do not engage in more criminal actions, but are simply more likely to be arrested, charged, convicted, and sentenced for violent crimes. For our purposes here, this is what is most important. For whatever the reason that blacks are going to prison sentenced for violent crimes, it is important for us to acknowledge that this has implications for racial disparities in imprisonment, and it has consequences for the policies initiated as a result of the movement to reduce mass incarceration.

IV. TWO PRIMARY POLICIES LEAD TO MASS INCARCERATION

No one, to my knowledge, set out to bring about mass incarceration. The United States instead fixated on criminal justice solutions to perceptions, real and imagined, that we had a crime problem that needed to be curbed and a drug epidemic that was sweeping the country.

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- 62 Robert J. Sampson, *Racial Stratification and the Durable Tangle of Neighborhood Inequality*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 260, 264 (2009). RUTH D. PETERSON & LAUREN J. KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE 12, 18–19 (2010).
 - 63 Michael J. Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV., 93, 94 (1978).
 - 64 Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME AND JUST., 311, 319 (1997).
 - 65 Karen F. Parker & Patricia McCall, *Structural Conditions and Racial Homicide Patterns: A Look at the Multiple Disadvantages in Urban Areas*, 37 CRIMINOLOGY, 447, 463 (1999).
 - 66 Callie Harbin Burt et al., *Racial Discrimination, Ethnic-Racial Socialization, and Crime: A Micro-Sociological Model of Risk and Resilience*, AM. SOC. REV., 648, 649 (2012).
 - 67 Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 YALE L. J. OF EMPIRICAL LEGAL STUD., 751 (2014). Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, AM. J. OF PUB. HEALTH, 302046 (2014).

Good documentation is available supporting the contention that mass incarceration in the United States is largely a consequence of two multi-decade policy regimes; get-tough-on-crime and criminals policies, and the war on drugs.⁶⁸ These policy regimes made changes both in federal and state laws and practices. Together they resulted in the well-documented quintupling of imprisonment in the US beginning in about 1980 (see Figure 1 above). Now, there are efforts to roll back mass incarceration at the federal level and in many but not in all states.

A. Tougher Sentences for Violent Offenses is a Source of Mass Incarceration

The get-tough-on-crime rhetoric began with two narratives, the “law and order” planks for Republican Party and Richard Nixon’s campaign in 1968 and the “nothing works” statements by a small group of criminologists in the mid-1970s. Nixon’s self-branding as the law and order candidate was a part of his Southern Strategy, a concerted effort to attract Southern white voters who had long voted Democratic but were disaffected by that party’s support for the civil rights movement.⁶⁹ The urban riots of the 1960s, the anti-Vietnam War protest, and campus activism further fueled their efforts to convince voters that there was a need for a crackdown, for more “law and order.”

Martinson’s argument that rehabilitation does not work to curtail crime is a good example of a narrative that was not widely supported by evidence, but which was widely believed.⁷⁰ In the face of rising crime rates, this narrative convinced many policymakers that there was little that could be done other than to lock up offenders for longer periods of time.⁷¹ If we could not rehabilitate them, the nation would focus on deterring them and incapacitating those who would not be deterred. Republican law and order candidates for public office found competition from their Democratic Party rivals who did not want to appear “soft on criminals.” Together they railed against permissive judges, lax laws, light sentences, and loopholes that allowed the convicted to avoid their just deserts.

The resulting policies reduced judicial discretion, lengthened sentences, created “truth in sentencing laws” that eliminated early prisoner release for good time, limited and in some states eliminated parole, added sentencing enhancements, and established mandatory minimum sentences for some offenses. This national mood also led to “reforms” such as the three strikes laws that began in Washington state and spread to California and then across the country. They were eventually adopted in federal statutes, as well as changes such as civil commitments for sex offenders after they served their sentences. Additionally, many states severely cut

68 NAT’L RESEARCH COUNCIL, *Supra* note 16; TONRY, *supra* note 16; ALEXANDER, *supra* note 16.

69 TONRY, *supra* note 16, at 82–83.

70 Robert Martinson, *What Works? - Questions and Answers About Prison Reform*, 35 PUBLIC INTEREST 22 (1974), http://www.pbpp.pa.gov/research_statistics/Documents/Martinson-What%20Works%201974.pdf.

71 Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True that Nothing Works?* WASHINGTON POST (1989), <http://www.prisonpolicy.org/scans/rehab.html>.

back on rehabilitation investments, removing many therapeutic, educational, and training programs from prisons. These changes led to substantial increases in the number of men and women confined in both federal and state prisons. And, while there was racial disproportionality in American prisons prior to 1980,⁷² these changes led to a perpetuation as well as a likely increase in racial disparity.⁷³

B. The War on Drugs is Another Cause for Mass Incarceration

The “War on Drugs” that was instituted by the Reagan Administration was actually the second “war”; an earlier version was instituted during the Nixon administration as a part of its larger “war on crime.” Actually, these wars on drugs were a continuation of criminal justice efforts to restrict the recreational use of drugs that began with the Harrison Act of 1914.⁷⁴ These efforts continued with the Marijuana Stamp Act of 1937⁷⁵ and were amped up by Rockefeller’s get tough antidrug laws in New York in the early 1970s and Nixon’s war on drugs in the late 1960s. They reached full flower with the Reagan declaration.

The criminal justice approach to dealing with drugs was led by the federal government, but it was widely embraced by the states as well. Key provisions at both levels were increased sentences for possession, sales, and transporting of drugs, as well as mandatory minimum sentences. The well-known increased sentences length for those convicted of crack cocaine violations, as opposed to those for powder cocaine, were products of the hysteria that resulted when several nationally known athletes died of overdoses, and inner city communities appeared to be devastated by a crack epidemic.⁷⁶

Generally, it is thought that about one third of the substantial increase in the number of prisoners incarcerated in the United States can be traced to legal changes with the war on drugs. Clearly it was a substantial contributor.⁷⁷ Also, even though there is good evidence that African Americans and Latinos use and sell drugs proportionately to their presence in the US population, men and women from

61 Scott Christianson, *Legal Implications of Racially Disproportionate Incarceration Rates*, 31 CRIM. L. BULL., 59 (1980); Blumstein, *supra* note 26; George S. Bridges & Robert D. Crutchfield, *Law, Social Standing and Racial Disparities In Imprisonment*, 66 SOC. FORCES, 699 (1988); George S. Bridges et al., *Crime, Social Structure and Criminal Punishment: Influences of Stratification and Urbanization on White and Nonwhite Rates of Imprisonment*, 34 SOC. PROB., 345 (1987); Robert D. Crutchfield, et al., *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, J. OF RES. IN CRIME AND DELINQ., 166 (1994).

73 Blumstein, *supra* note 26; Alfred Blumstein, & A. J. Beck, *Trends in U.S. Incarceration Rates (1980–2010)*; NAT’L RESEARCH COUNCIL, *supra* note 16. Tonry, *supra*, note 16.

74 Harrison Narcotics Tax Act, ch.1 (38 Stat.) 785.

75 Marihuana Tax Act of 1937, Pub. 238, 75th Congress, (50 Stat.) 551 (Aug. 2, 1937)

76 Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, CONTEMPORARY DRUG PROBLEMS 1989, 535, 558-562.

77 Alexander, *supra* note 16, at 59.

these ethnic groups have been disproportionately convicted and incarcerated for drug offenses as a result of the war on drugs.⁷⁸

V. UNINTENDED CONSEQUENCES OF THE NEW CRIMINAL JUSTICE SOCIAL MOVEMENT

Adopting policies that are intended to keep the current bipartisan movement for criminal justice reform intact may conflict with criminological facts that are well-known among research criminologists, and as a result may lead to unfortunate, unintended consequences. The likelihood of these consequences is exacerbated by the understandable desire of political leaders to minimize the chances that they will be publically embarrassed by public statements that they make or policies they support. To date, the effort to reform the criminal justice system and to reduce mass incarceration has focused on first time offenders, low level drug offenders, and nonviolent offenders. Introducing his “smart on crime initiative” in 2013, former US Attorney General Eric Holder emphasized laudable objectives, “By targeting the most serious offenses, prosecuting the most dangerous criminals, directing assistance to crime ‘hot spots,’ and pursuing new ways to promote public safety, deterrence, efficiency, and fairness - we can become both smarter and tougher on crime.”⁷⁹

The implementation of this policy, thus far, may have the unintended consequences of increasing crime, maintaining or maybe even increasing racial disparity in imprisonment, and perhaps truncating the savings that federal and state officials hope to gain from criminal justice reform. This latter potential consequence is especially likely if Holder’s call to increase treatment and to provide reentry support are heeded. These efforts will be cheaper than imprisonment, but they are not free and will require substantial and sustained funding.

The focus on releasing first time offenders earlier or sparing them prison sentences means that they will not be in custody for a longer portion of their “crime prone years,” the time between when they are subject to the adult criminal court and when most people “age out” of crime in their mid-twenties. Coupled with the knowledge that people generally do not specialize in types of crime, the focus on first time drug and nonviolent offenders deludes us collectively into believing that they are relatively safe. What they are safer from is the kind of Willie Hortonesque embarrassment to officials or the movement to reduce mass incarceration.⁸⁰ There is little reason to believe that very young men and women who have violated the law may not continue to do so and may not do so in ways that include violence unless the broader social deficits and their own personal deficits are addressed,

78 *Id.*; Tonry, *supra*, note 16, at 54.

79 *The Attorney General’s Smart on Crime initiative*, U.S. DEPT. OF JUSTICE (2013), <https://www.justice.gov/ag/attorney-generals-smart-crime-initiative> (remarks made by then Attorney General Eric Holder to the American Bar Association’s Annual Convention in San Francisco, CA, August 12, 2013).

80 Morgan Whitaker, *The legacy of the Willie Horton ad lives on, 25 years later*, MSNBC (Oct. 21, 2013, 10:30 PM), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives>.

corrected, or eliminated. This is especially so if they remain in or are released to the same or similar communities as those that incubated their earlier offenses. Releasing people in this group without accompanying measures risks increasing crime—a prediction by opponents of current criminal justice reform efforts. To make this approach work, it is imperative that drug treatment programs and reentry services that former Attorney General Holder spoke of be put in place immediately, not at some distant time when the money might be available. And, if we are serious about ending mass incarceration, it is unlikely to happen without significant investment and effort to reduce educational and employment inequalities in the communities from which most offenders come from and, more often than not, return to after release for prison.

Ending the war on drugs and changing American policy to focus less on criminal justice solutions and more on therapeutic remedies may have two diametrically opposed effects on racial disparities in the criminal justice system. There is racial disproportionality in incarceration for drug offenses that *cannot* be explained or justified by differential involvement in drug crimes.⁸¹ Currently, substantially more people of color are imprisoned for drug offenses than we should expect based on evidence of racial patterns of drug using and selling. Because African Americans and Latinos use and traffic drugs at the same rates as do whites, simply reducing the number of offenders who are imprisoned for low level offenses will have limited to no effect on racial disparity. If, on the other hand, corrections reforms are matched by enforcement, charging, prosecution, and court reforms, then there is the potential to reduce the racial disparity in imprisonment for drug offenses that cannot be justified by behavior differences between racial and ethnic groups. Broader reforms, which introduced more racial fairness in the criminal justice system's enforcement of drug laws and the provision of treatment options, would reduce racial disparities at all levels. Failure to make changes throughout the system are likely to perpetuate racial disparity in state and federal prisons, even if fewer individuals are subjected to this unjustifiable practice.

The issue with violent crime is more difficult. Clearly a substantial contributor to the growth in American imprisonment in recent decades is a result of policies to get tough on violent offenders. Just as clearly, African Americans are more likely to be imprisoned for violent offenses than others in the population. We have to recognize that a substantial portion of the current racial disparity in US prisons is a result of longer sentences for violent crime, and if that fact is not addressed, when punishments are decreased and therapeutic solutions are increased for some other offenses, it is very likely that racial disparity in incarceration will increase; perhaps, it will grow substantially because of the racial distribution of convictions for violent crimes.

81 Tonry, *supra* note 16, at 58–59.

Policymakers and practitioners, as well as those who have joined the movement for prison reform, do not want to put the public at greater risk. And we would be naive not to recognize that a fair number of those calling for and those putting reforms into place, are anxious to not be embarrassed by crimes, especially violent crimes that might be committed by people who would have been incarcerated under the old regime.

If we recognize the important criminological fact that criminals do not specialize and that those who have committed violent crimes may do so again (but so too will many other offenders), it may not soothe the concerns of those attempting to minimize their chance of embarrassment; but it may provide flexibility for those who are more focused on minimizing danger to the public. We can continue to lock up those convicted for the most serious crimes and for serious violent crimes for longer sentences than we do others, but if we are to avoid increasing racial disparity in the criminal justice systems, including in state and federal prisons, reform in sentencing laws, policies, and practices for all crimes have to be a part of the reform conversation.

If we are too timid in our efforts to reform criminal justice in America, there are likely to be other unintended consequences; two important ones are the toll that current policies have on communities of color, and the cost that are becoming increasingly burdensome to the states. The high rates of imprisonment of African Americans⁸² have led to what some criminologists have called “coercive mobility.”⁸³ Coercive mobility refers to the forced extraction from communities of those convicted and sentenced to prisons, and their return at the conclusion of their sentence to the same or very similar communities. With approximately one third of lowly educated African American men residing in prison, coercive mobility has substantial and very profound effects on poor, inner city black communities.⁸⁴ These “collateral effects” on communities are thought to disrupt families, decrease employment, further reduce income, and possibly increase crime. If changes provoked by the social movement to end mass incarceration are not grounded in good criminological understanding of crime and criminals and do not include changes to how we respond to all types of crimes, these problems will persist, and possibly grow more dire with the passage of time.

Building, staffing, and maintaining prisons are a growing and considerable expense for the states. If the status quo continues, that expense will grow with time as a result of court cases that have defined very high levels of overcrowding to be

82 BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA, (Russel Sage Foundation 2006); BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS (Russel Sage Foundation 2012).

83 Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital and Crime: Examining the Unintended Consequences of Incarceration*, 47 CRIMINOLOGY 441 (1998); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007).

84 CLEAR, *supra* note 71; NAT'L RESEARCH COUNCIL, *supra* note 16.

cruel and unusual punishment.⁸⁵ Because the prison population is aging, health care costs will increase as well. If timidity and safety from embarrassment prevents legislatures from taking bolder actions, these costs will only be trimmed at the margins.

VI. ALTERNATIVES

What might be done to avoid the negative consequences of criminal justice reforms that do not more aggressively try to reduce mass incarceration in the United States? The first two alternatives are clearly implied by what is written above: take seriously that which criminologists have learned about crime and criminals. To be fair, there is obviously a lot that we do not know, but we do know about the age crime curve, that most offenders do not specialize in the crimes they commit, that there are racial differences in criminal involvement, and that there are unjustifiable, racialized practices in how the current criminal justice system operates. The second alternative is to be bolder in the reforms that are considered. Be bolder in deciding who to release early and who to treat therapeutically rather than in a corrections model (or at least more aggressively combine these two approaches when necessary). And, be bolder in reforming current sentencing policies. Being too timid, in addition to reducing the likelihood that reforms will meet the goals of reducing mass incarceration, improving the life chances of those moving through the criminal justice system, and aiding families, communities, and states, may well increase the likelihood of embarrassingly increasing crime rates. Being too timid may also increase the chance that someone who is released will do something unfortunate that embarrasses politicians and reformers.

A third alternative is to abandon the release of current inmates based on the category of crime in which they were convicted. This might be done with a more nuanced decision making model that focuses on the probability of individual inmates reoffending. This might be accomplished by returning to something that looks like the old parole model. Of course there were problems with the way that those old systems performed, not the least of which was somewhat arbitrary decisions and racial and other biases influencing outcomes. Getting rid of parole (in the states that did this) has not eliminated racial disparity in imprisonment. Bringing back a more individualized, nuanced decision making model to determine who is released, based on observable, measurable factors with checks in place, may lead to better decisions than those based on the offense for which a person was incarcerated.

Finally, the current movement to reform the American criminal justice system has a greater chance of ending mass incarceration and doing it in a fair way that also protects the citizenry—if the reforms are consistent with longstanding

85 *E.g.*, *Brown v. Plata*, 563 U.S. 493 (2011).

values and normative principles of western jurisprudence and punishment. These values and principles were enunciated by the National Academy of Science study panel on The Growth of Incarceration in the United States.⁸⁶ That panel held that we should aspire to have a criminal justice system that operates according to these values and principles:

- *Desert and proportionality*: Punishments are said to be deserved, and therefore just, only to the extent that their severity is apportioned to the seriousness of the crimes for which they are imposed. Because of myriad differences in the circumstances of offenses and offenders, punishments may sometimes justly be less severe than is maximally deserved but should never be more severe.
- *Parsimony*: Punishments for crime, and especially lengths of prison sentences, should never be more severe than is necessary to achieve the retributive or preventative purposes for which they are imposed.
- *Citizenship*: The conditions and consequences of punishments for crime, especially terms of imprisonment, should not be so severe or so enduring as to violate an individual's fundamental status as a member of society
- *Social justice*: Prisons should be instruments of justice. Their collective effect should be to promote, and not to undermine, society's aspirations for a fair distribution of rights, resources, and opportunities.⁸⁷

The likelihood of unintended consequences of efforts to tamp down mass incarceration and its ill effects will be attenuated if, instead of "safe feeling" and piece meal reforms, policymakers look to the science of criminology and corrections and apply these principles. This will not, unfortunately, lower the chance that politicians might be embarrassed by a criminal event, but the fact of the matter is that they are, in reality, not protecting themselves from such events with less principled changes. What they have with current efforts are strategies that will allow them to cover their political back sides, but they are not likely to save citizens' money, protect them, help minority communities, or make the American criminal justice system more just. At the least, if the best science available is used, and principled reforms are enacted, both reform movement leaders and policymakers will be able show a sound basis for why they have made changes and why they expect that those changes will work for both the citizens who are not locked up and those who are.

86 NAT'L RESEARCH COUNCIL, *supra* note 16.

87 *Id.* at 323.